IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 88

ELLA F. FONDREN AND THE ESTATE OF W. W. FONDREN, DECEASED, ELLA F. FONDREN, INDEPENDENT EXECUTRIX,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent

On Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

BRIEF OF PETITIONERS

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SUBJECT INDEX

TABLE OF CASES

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BRIEF OF PETITIONERS

Nature of the Case

This cause involves United States gift tax deficiencies alleged by Respondent to be owing by W. W. Fondren and wife, Ella F. Fondren, for the calendar year 1937.

The question involved is whether or not the several gifts made in trust by W. W. Fondren and Ella F. Fondren respectively on December 2, 1937, to seven separate trusts, each of which trusts named one of the grantors' grandchildren as beneficiary, constituted gifts of future interests to the particular grandchild within the meaning of Subdivision (b)

of Section 504 of the Revenue Act of 1932 as effective at the time said gifts were made.

Brief History of Case to Date

This case is a consolidated case and involves the validity of certain gift tax deficiency assessments originally complained of by Petitioners in two cases filed in The Tax Court of the United States. One of said two cases was numbered 107,-473 on the docket of said The Tax Court of the United States and was styled Ella F. Fondren, Petitioner, v. Commissioner of Internal Revenue, Respondent. The other of said two cases was numbered 107,474 on the docket of said court and was styled Estate of W. W. Fondren, Deceased, Ella F. Fondren, Independent Executrix, Petitioner, v. Commissioner of Internal Revenue, Respondent.

The two cases next above referred to were upon hearing by The Tax Court of the United States consolidated for decision purposes, and upon decision by said court the consolidated case was duly appealed to The United States Circuit Court of Appeals, Fifth Circuit.

References to Official Reports of Opinions Delivered in the Courts Below

The opinion of The Tax Court of the United States, (R. 28-36) is reported at 1. TC. 1036.

The opinion of the United States Circuit Court of Appeals (R. 71-78) is reported at 141 F. (2d) 419.

Jurisdiction of the Court

The jurisdiction of the Supreme Court of the United States is invoked under Section 240(a) of the JUDICIAL CODE as amended by the Act of February 13, 1925.

Petitioner invokes the jurisdiction of the Supreme Court of the United States under said Section 240(a) for the following reasons:

FIRST—The decision of the United States Circuit Court of Appeals for the Fifth Circuit, in holding the gifts now under consideration to be gifts of future interests, cites the decisions of this Honorable Court in the cases of UNITED STATES v. PELZER, 312 U.S. 399, and RYERSON v. UNITED STATES, 312 U.S. 405, and stems either from a misunderstanding of the effect of such decisions or from an unwarranted extension of the legal principles announced therein.

SECOND—The decision of the United States Circuit Court of Appeals for the Fifth Circuit, in holding the gifts under consideration to be gifts of future interests, is in conflict with the following decisions:

(a) The decision of the United States Circuit Court of Appeals for the Eighth Circuit in the case of SMITH v. COMMISSIONER, 131 Fed. (2d) 254.

(b) The decision of the United States Circuit Court of Appeals for the Seventh Circuit in the case of SENSENBRENNER v. COMMISSIONER, 134 Fed. (2d) 883.

(c) The decision of the District Court of the United States for the Northern District of California, Southern Division, in the case of KINNEY v. ANGLIM, 43 Fed. Supp. 431.

(d) The decision of the United States Circuit Court of Appeals for the Third Circuit in the case of DISSTON v. COMMISSIONER, 144 Fed. (2d) 115.

THIRD—The question of whether or not gifts such as those now under consideration are gifts of future interests

will most certainly be presented in numerous cases, and therefore the promulgation by this Court of the sound principle of decision will obviate much unnecessary and prolonged litigation.

FOURTH—The decision of the United States Circuit Court of Appeals for the Fifth Circuit, in holding the gifts under consideration to be gifts of future interests, is intrinsically wrong and unless corrected by this Court will operate to multiply and prolong litigation until the correct rule of decision is announced by this Court.

Concise Statement of Case

From long prior to March 20, 1930, and continuously until January 5, 1939, the date of the death of W. W. Fondren, the said W. W. Fondren and wife, Ella F. Fondren, lived together as husband and wife and during all of said time maintained their residence and domicile within the State of Texas (R. 43).

Under dates December 17, 1935, December 7, 1936, and December 2, 1937, by formal written instruments duly executed by said W. W. Fondren and Ella F. Fondren before W. O. Manning, Notary Public in and for Harris County, Texas, the said W. W. Fondren and wife, Ella F. Fondren, made, established, published and declared seven (7) certain trusts, and by the terms of each of said formal written instruments constituted the said W. W. Fondren trustee to administer the trusts, with the further provision that upon the death or resignation of said W .W. Fondren the said Ella F. Fondren should succeed to the trusteeship, and with further provisions providing for the appointment of successor trustees, all as in said written instruments expressly provided (R. 43-44).

Of the said seven (7) certain written instruments next above referred to:

> One established a trust for Ellanor Anne Fondren, the daughter of Walter W. Fondren, Jr., and successor beneficiaries as therein provided;
> One established a trust for Mary Doris Fondren, the daughter of Walter W. Fondren, Jr., and successor beneficiaries as therein provided;
> One established a trust for Peter Fondren Underwood, the son of Catherine Fondren Underwood, and successor beneficiaries as therein provided;
> One established a trust for Wash Bryan Trammell, Jr., the son of Sue Fondren Trammell, and successor beneficiaries as therein provided;
> One established a trust for Sue Trammell, the daughter of Sue Fondren Trammell, and successor beneficiaries as therein provided;
> One established a trust for David Milton Underwood, the son of Catherine Fondren Underwood, and successor beneficiaries as therein provided;
> One established a trust for Walter William Fondren, III, the son of Walter W. Fondren, Jr., and successor beneficiaries as therein provided (R. 43).

For all purposes of this cause, all seven (7) of said trust instruments are of substantially the same terms and provisions as are contained in PETITIONER'S EXHIBIT 1-D (R. 51-64), saving and excepting only that the names and genders of the primary beneficiaries of said trusts vary in order to create a different trust for each of the seven primary beneficiaries (Stipulation in connection with Petition for Review, R. 65-66).

The following paragraphs constitute the pertinent provisions of the TRUST INDENTURE dated December 17, 1935, and naming Wash Bryan Trammell, Jr., and his successors as beneficiaries, and which trust indenture constitutes Exhibit

1-D as offered in evidence at the hearing of this cause (R. 51-63).

(a) The opening lines read as follows:

> "KNOW ALL MEN BY THESE PRESENTS: that we, W. W. Fondren and his wife, Ella F. Fondren, of the State of Texas and County of Harris, and hereinafter referred to as Grantors, do hereby make, establish, publish, and declare a trust and gift for our Grandson, Wash Bryan Trammell, Jr., the son of our daughter Sue Fondren Trammell, upon the terms, conditions and with the limitations hereinafter set forth, and for the purposes and objects herein expressed; and in consideration thereof, and in consideration of the love and affection which we bear to our said Grandson, we have granted, assigned, transferred, set apart and conveyed, and by these presents do grant, assign, transfer, set apart and deliver, to W. W. Fondren, as Trustee, and only in his capacity as Trustee, and to his successor and successors as such Trustee, all of the property described in 'Exhibit A' which is hereto attached" (R. 51).

(b) The first four paragraphs of *Article Three* deal with the designation of beneficiaries and read as follows:

> "Out of the trust estate hereby created and as the same may hereafter be augmented and increased by gift from the Grantors or either of them as herein provided for, or from any other source whatsoever, the Trustee shall provide for the support, maintenance and education of our said Grandson, using only the income of said estate for that purpose if it be sufficient. If it be necessary to use any of the corpus of the estate for that purpose and in the judgment of the Trustee it is best to do so, said Trustee may make advancements out of the corpus of said trust estate for such purpose for the benefit of our said Grandson.

"It is contemplated, however, that our said Grandson will have other adequate and sufficient means of support, and that it will not be necessary to use either the income or the corpus of the trust estate hereby created to properly provide for his education, maintenance and support; and, if the income from the trust estate be not needed for these purposes, then all of the income from said trust estate not so needed shall be by the Trustee passed to capital account of said trust estate, and shall be and become a part of said trust estate, it being our hope that all of the earnings and income of said trust estate during the period of this Trust may be used to augment the trust estate and be delivered to our said Grandson at the periods herein provided for. It is expressly provided, however, that our said Grandson shall be properly maintained, educated and supported, and if it be necessary to use all of the income and even all of the corpus of the trust estate hereby created and all augmentations thereof, it shall be the duty of the Trustee to see that this obligation shall be properly and reasonably discharged.

"This trust shall endure and continue until our said Grandson attains the age of twenty-five years, at which time the Trustee then acting shall deliver to him twenty-five percent (25%) of said trust estate and its accumulations, if any, and shall retain the remainder thereof until our said Grandson shall attain the age of thirty years, when the Trustee shall deliver to him thirty-three and one-third percent (33 1/3%) of the total amount of said estate then in his possession, including also the accumulations thereof; and the remainder of said estate shall be continued thereafter until our Grandson shall reach the age of thirty-five years, at which time all of said trust estate remaining in the hands of the Trustee shall then be delivered to our said Grandson. These deliveries, however, are conditioned upon and subject to the continued life of our said Grandson until each such period is reached.

"If our said Grandson, Wash Bryan Trammell, Jr.,

shall die leaving issue him surviving, before all of said trust estate shall be delivered to him, the said Wash Bryan Trammell, Jr., then said trust estate then held by the Trustee shall be held and administered by the Trustee for the benefit of such surviving issue of the said Wash Bryan Trammell, Jr., and shall be delivered to such issue, share and share alike, when the youngest of such issue shall attain the age of twenty-one years. If our said Grandson shall die without issue before the trust estate is finally delivered in full to him under the terms hereof, then all of the trust estate in the hands of the Trustee at the time of his death shall be held and administered by the Trustee for the use and benefit of our Granddaughter Sue Trammell, and shall be distributed to her in the same manner, and at the same periods of her age as herein provided for our said Grandson Wash Bryan Trammell, Jr.; and if she, the said Sue Trammell, shall die before said estate is delivered to her by the Trustee under the terms hereof and leave issue her surviving, said estate shall be held and administered by the Trustee for the benefit of such issue, and when the youngest of such issue shall attain the age of twenty-one years said estate shall be delivered to such issue share and share alike. If the said Sue Trammell shall die without issue, however, before the distribution of said trust estate is completed, the amount then in the hands of the Trustee shall descend to and be distributed to her heirs under the laws of the State of Texas" (R. 54-56).

(c) The first sentence of *Article Five* reads as follows:

"The purpose in creating this trust is to provide for the personal comfort, support, maintenance and welfare of our said Grandson" (R. 57).

(d) The opening lines of the closing paragraph reads as follows:

"For the protection, education, support and main-

tenance of our said Grandson we have made and executed this instrument" (R. 62).

(e) By the terms of *Article Six* the trust created by the TRUST INDENTURE is made *"absolutely and finally irrevocable,"* with no reservation of any right *"to any interest in said trust estate, nor to any income therefrom, nor to any increase thereof, of any kind or character whatsoever, and * * * no defeasance of said trust estate under any terms, conditions, or circumstances whatsoever; and * * * no individual interest of any kind or character in, to, or unto said trust estate or any part thereof"* (R. 58-59). (Italics ours.)

The birthdays of the several grandchildren beneficiaries are as follows (R. 45):

Ellanor Anne Fondren was born July 23, 1932.
Mary Doris Fondren was born March 20, 1930.
Peter Fondren Underwood was born October 1, 1933.
Wash Bryan Trammell, Jr., was born March 10, 1935.
Sue Trammell was born August 5, 1933.
Walter William Fondren III, was born April 29, 1936.
David Milton Underwood was born March 5, 1937.

On or about December 2, 1937, W. W. Fondren and Ella F. Fondren each gave to said W. W. Fondren, Trustee of and for each of said above mentioned seven (7) trusts, one hundred (100) shares of Humble Oil & Refining Company stock, the gift to the David Milton Underwood trust being the first gift to such trust, and the gifts to the respective trusts for the other grandchildren being gifts in augmentation of the respective trust estates as theretofore existing (R. 46).

The fair market value of Humble Oil & Refining Company stock on December 2, 1937, the date on which said gifts to

said respective trusts were made by said W. W. Fondren and Ella F. Fondren, was $59.75 per share so that the fair market value of each of said 100-share gifts was $5,975.00 (R. 46).

W. W. Fondren continued to act as trustee in the administration of each and all of the trusts hereinabove mentioned until his death on January 5, 1939. Upon the death of W. W. Fondren the said Ella F. Fondren succeeded to the trusteeship of each and all of said trusts, as provided for therein, which trusteeship she has continuously since exercised and now exercises (R. 46).

The said beneficiaries, Ellanor Anne Fondren, Mary Doris Fondren, Peter Fondren Underwood, Wash Bryan Trammell, Jr., Sue Trammell, Walter William Fondren, III, and David Milton Underwood are all living at the date of the trial of this cause (R. 47).

At all times subsequent to the creation of the trusts hereinabove specifically referred to the parents of the respective grandchildren beneficiaries have respectively, adequately, and sufficiently provided for the proper and adequate support, maintenance and education of the said beneficiaries, with the result that no part of either income or corpus of either of said trust estates has been distributed, used, or applied to or for the benefit, support, maintenance or education of either of said beneficiaries (R. 47).

In due time said W. W. Fondren and Ella F. Fondren filed in regular course their Gift Tax Returns for the calendar year 1937 and in said Gift Tax Returns showed each of the above referred to gifts to said above referred to seven (7) respective trusts and in connection with each of said gifts in trust the said W. W. Fondren and Ella F. Fondren each claimed the statutory $5,000.00 annual exclusion and therefore respectively reported as to each of said gifts a taxable gift for the year 1937 in the amount of $975.00 representing

the difference between the annual $5,000.00 exclusion and the fair market value of the particular gift; to-wit, $5,-975.00. Said W. W. Fondren and Ella F. Fondren then in regular course paid gift taxes on the basis of the taxable gifts so reported by them respectively as to each of said respective trusts (R. 47-48).

In determining the 1937 gift tax deficiencies which are involved in these proceedings, the Commissioner disallowed as to each petitioner the seven exclusions of $5,000.00 each (or total disallowed exclusions of $35,000.00 as to each petitioner) which had been claimed by petitioners on account of gifts above referred to. In his deficiency notice disallowing these exclusions, the Commissioner made the explanation that said gifts constituted gifts of future interests in property against which no exclusions are allowable (R. 49).

The fair and reasonable cost of support, maintenance and education of each of the grandchildren beneficiaries in accordance with the standard of living to which they were accustomed prior to and during the year 1937 would reasonably be not less than $750.00 (R. 67).

W. W. Fondren left a will naming Ella F. Fondren Independent Executrix of his Estate and in due time she made application to the Probate Court of Harris County, Texas, for the probate of said will and for letters testamentary. In due course the will was admitted to probate and Ella F. Fondren appointed and qualified as Independent Executrix of the Estate of W. W. Fondren, Deceased, in which capacity she now acts (R. 47).

SPECIFICATIONS OF ERROR

First Assignment of Error:

The United States Circuit Court of Appeals for the Fifth Circuit erred in holding that the gifts

under consideration constituted gifts of future interests.

Second Assignment of Error:

The United States Circuit Court of Appeals for the Fifth Circuit erred in disallowing the $5,000.00 statutory exclusion in connection with each of the several gifts now under consideration.

Summary of Argument

The judgment and decision of the United States Circuit Court of Appeals for the Fifth Circuit under review herein is erroneous for the following reasons:

I.

Each of the gifts now under consideration, immediately upon its consummation, constituted a gift to the specifically named grandchild beneficiary then in esse.

II.

Each of the gifts now under consideration, immediately upon its consummation, was made to and for the benefit of the specifically named grandchild beneficiary.

III.

Each of the gifts now under consideration, immediately upon its consummation, was available, both income and corpus, to the specifically named grandchild beneficiary for his or her personal comfort, support, maintenance, welfare, protection and education and has continued so available down to the present time.

IV.

At no time subsequent to the making of the gifts now under consideration did any person whomsoever have any right or discretion to withhold from or deny to the specifically named grandchild beneficiary the use, possession or enjoyment of any part of either income or corpus reasonably necessary or proper for the personal comfort, support, maintenance, welfare, protection and education of said grandchild beneficiary.

V.

By no proper construction of the trust instruments now under consideration can it be held that any discretionary power was vested in the trustee or any other person to withhold from or deny to the specifically named grandchild beneficiary the right, immediately upon the consummation of the gift, to demand and receive, primarily from income but secondarily from corpus, each and every distribution proper to be made for the personal comfort, support, maintenance, welfare, protection and education of said specifically named grandchild beneficiary.

VI.

By no proper construction of the trust instruments now under consideration can it be reasonably held that the use, possession and enjoyment of the respective gifts by the specifically named grandchild beneficiary depended upon the survivorship of the particular beneficiary in any different way than the use, possession and enjoyment of property by a fee simple owner thereof is dependent upon the continued survival of such fee owner.

VII.

Neither of the gifts under consideration constitutes either

a reversion, remainder or any other interest or estate limited to commence in use, possession or enjoyment at some future date or time.

VIII.

Each of the gifts now under consideration, immediately upon its consummation, vested in the specifically named grandchild beneficiary all such use, possession and enjoyment as such grandchild beneficiary was capable of exercising at the time of the gift.

IX.

Each of the gifts now under consideration, immediately upon its consummation, vested in the definitely named grandchild beneficiary the fullest use, possession and enjoyment that was possible to be sensibly conferred upon a child of such tender age.

X.

Neither of the gifts under consideration constitutes a gift of future interest within the meaning of any principle announced in either of the following cases:

UNITED STATES v. PELZER, 312 U.S. 399—In this case a gift was held to be a gift of future interest where the gift was made for the benefit of eight living grandchildren and all after born grandchildren, and no distribution was permitted to any beneficiary during the ten year period next succeeding the making of the gift and with distribution after the expiration of said ten-year period to be made only to such beneficiaries as should live to attain the age of twenty-one years.

RYERSON v. UNITED STATES, 312 U.S. 405—In this case the gift of insurance policies on the life of the donor was held to be a gift of future interest where no distribution could be made to a beneficiary unless such beneficiary

should survive the donor and where the trust was subject to be terminated either by the joint action of two of the trustees or by the death or mental incapacity of either of the trustees.

FISCHER v. COMMISSIONER, 132 F. (2d) 383—In this case the gift of the corpus of the trust was held to be a gift of future interest where the gift was made or the benefit of six minor grandchildren and no distribution of the corpus could be made to any beneficiary until such beneficiary should attain the age of twenty-five years.

COMMISSIONER OF INTERNAL REVENUE v. WELLS, 132 F. (2d) 405—In this case the gift was held to be a gift of future interest where the gift was made for the benefit of a minor child and distributions prior to the time when the beneficiary attained the age of twenty-one years were entirely and exclusively in the discretion of the trustee.

SENSENBRENNER v. COMMISSIONER, 134 F. (2d) 883—In this case the gift of the corpus of the trust was held to be a gift of future interest where the gift was made for the benefit of a minor grandchild and no distribution of corpus could be made until a designated future date.

COMMISSIONER v. PHILLIPS' ESTATE, 126 F. (2d) 851—In this case the gift was held to be a gift of future interest where the trustee was authorized, if he should see fit to do so, to make distributions to the beneficiaries in such amounts as such trustee deemed desirable or necessary, and with the discretionary power vested in the trustee to increase or decrease distributions from time to time as he might consider proper.

XI.

Each of the gifts now under consideration, immediately upon its consummation, constituted a gift of a present interest because under any proper construction of the trust instruments the functions of the trustee were the identical func-

tions which a guardian of a minor would ordinarily perform and therefore the use, possession and enjoyment of the trustee was in legal contemplation the use, possession and enjoyment of the minor.

XII.

Each of the gifts now under consideration, immediately upon its consummation, constituted a gift of a present interest because under any proper construction of the trust instruments the gift to the minor grandchild was immediate, definite, absolute and irrevocable, and in no sense dependent upon the happening of any future event either for the determination of the identity of the donee or the quantum of the donation.

Argument

SUBDIVISION A. *Brief Statement Concerning Exclusion Provisions of the Federal Revenue Acts and Regulations*

The First Federal Gift Tax Law was enacted in 1924. It was in no sense an involved statute and levied a graduated gift tax on gifts totalling for any particular tax year in excess of $50,000.00, with a specific limitation that gifts to any one donee totalling $500.00 or less for the particular tax year should be excluded in computing net taxable gifts. The 1924 Act was repealed in 1926, and from the date of such repeal until the effective date of the 1932 Act there was no Federal Gift Tax statute, though during this intervening period numerous questions came before the Treasury Department and the Courts as to the interpretation and application of the 1924 Act.

When the 1932 Act was pending before Congress, the legislative committees had the benefit of the prior experience in the administration of the 1924 Act and as a result of this

experience one important change in the fundamental policy of the law was made, in that the 1932 Act provided for only one specific $50,000.00 exemption in lieu of the annual $50,-000.00 exemptions as authorized by the 1924 Act. In other respects the 1932 Act was of similar pattern with the 1924 Act though in view of the drastic change as to the $50,-000.00 exemption, the policy with reference to small gifts was liberalized to provide for the exclusion of gifts (other than gifts of future interest in property) to one party during taxable year totalling not in excess of $5,000.00. The Committee Reports, Revenue Act of 1932, in referring to the non-exclusion of future interest gifts, is specific to the effect that the $5,000.00 exemption is available only insofar as donees are ascertainable, and that denial of exemption "is dictated by the apparent difficulty, in many instances, of determining the number of eventual donees and the values of their respective gifts."

In the administration of the 1932 Gift Tax Law two questions presented themselves for consideration in connection with gifts in trust. One question was whether the donee of the gift was the trust or the beneficiary of the trust. The other question involved the matter of distinguishing between gifts in trust constituting gifts of present interests and gifts in trust constituting gifts of future interests. An answer was ultimately found to the first question and it is now well settled that for the purposes of the 1932 Gift Tax statute the beneficiary of the trust is the donee.

As to distinguishing between gifts of present and future interests, however, no satisfactory rule had been promulgated by reason of the fact that this matter depends so largely on the wording of the particular trust instrument. In view of this situation the Treasury Department in 1938 presented to Congress for its consideration the advisability of amending

the Federal Gift Tax Law so as to deny exclusion to all gifts in trust.

The 1938 amendment to the Gift Tax statute accomplished this change in the law effective January 1, 1939; and this change continued effective until January 1, 1943, as of which date the Revenue Act of 1942 became operative to again authorize exclusion of gifts in trust if they are other than gifts of future interest.

At the effective date of the gifts under consideration the applicable provisions of the Revenue Act and Regulations read as follows:

> Subdivision (b) of Section 504 of the REVENUE ACT OF 1932, read,
>
> (b) Gifts Less Than $5,000.00—In the case of gifts (other than future interests in property) made to any person by the donor during the calendar year, the first $5,000 of such gifts to such person shall not, for the purposes of Subsection (a), be included in the total amount of gifts made during such year.

Article 11 of REGULATION 79 (1936 Edition), contained the following language:

> "Future interests" is a legal term, and includes reversions, remainders, and other interests or estates, whether vested or contingent, and whether or not supported by a particular interest or estate, which are limited to commerce in use, possession, or enjoyment at some future date or time."

Such was the status of the Federal Gift Tax law and regulations in 1937 when the gifts now under consideration were made.

SUBDIVISION B. *Brief Statement Concerning Fact Situation at Time Gifts Were Made*

W. W. Fondren and wife, Ella F. Fondren, respectively grandfather and grandmother of the seven (7) specifically named beneficiaries, aware of the uncertainty of human affairs and the serious possibility of financial reverse, undertook to provide for their several grandchildren some reasonable measure of security for support, maintenance, education and comfort. At the time the gifts were made each of said grandchildren were of tender years and utterly unable to administer property for themselves, so that it was impossible that any gift could be reasonably made without the intervention of a guardian, trustee or other person to properly protect the interest of the minor beneficiary. It is reasonable to assume that the trustors, after mature consideration and from the standpoint of minimizing expense and inconvenience, decided that it would be much preferable in the creation of the trusts to name themselves as trustees, and the trust instruments under consideration were accordingly so prepared and executed. The purpose of the trusts was most definitely stated and their irrevocability was provided in no uncertain terms.

Even a cursory reading of the trust instruments leads to the conclusion that they were thoughtfully prepared, and what would have been more natural than that these grandparent donors, having concluded that they should act as trustees, would have felt a decided urge to reserve to themselves some discretionary power in the matter of determining whether or not, and the extent to which, distributions to the beneficiary should be made. How easy and how natural it would have been to have inserted in these trust instruments such a provision if such was in fact the intent; and yet how utterly lacking is any such provision.

The word "discretion" appears nowhere in the trust in-

struments, but the whole tenor and declared purpose of each of the several instruments is the welfare of the specifically named grandchild beneficiary.

True it is that the trustors did feel that distributions out of corpus might be of more serious concern than distributions out of income; but even here it is in no sense the discretion of the trustee, but the continued and ample protection of the beneficiary, that is made the test. Necessarily, in the case of a small child, some competent person must be the primary judge as to the necessity and extent of reasonable requirements of the beneficiary; and under the trust instruments as finally executed, the preliminary, but by no means conclusive, determination of this most important matter was confided to the trustee.

The dominant and controlling purposes for which the trusts now under consideration were created are most definitely shown by the following references to the provisions of the trust instruments, to-wit:

1. The opening paragraph provides that the grantors "do hereby make, establish, publish and declare a trust and gift for" the specifically named grandchild.

2. Article Three provides that out of the trust estate hereby created "the trustee shall provide for the support, maintenance and education of" the specifically named grandchild.

3. Article Five provides that "the purpose in creating this trust is to provide for the personal comfort, support, maintenance and welfare of" the particularly named grandchild.

4. The opening lines of the last paragraph read "For the protection, education, support and maintenance of" the particularly named grandchild "we have made and executed this instrument."

SUBDIVISION C. *Discussion*

Preliminary to the examination of the exact nature of the gifts now under consideration it will be helpful to keep in mind that the congressional committee reports show that when Congress was considering the gift tax provisions of the REVENUE ACT of 1932 no suggestion was made that exclusions should be denied in cases of gifts for the benefit of definitely identified beneficiaries in esse at the time of the making of the gifts.

It is also of interest to note that up to the time the gifts under consideration were made Congress had never attempted to deal with gifts in trust on any different basis than other gifts, so that if exclusions are not to be allowed in the instant case the disallowance can be predicated only on the fact that the gifts are gifts of future interests.

It is also to be noted that the only reason ever referred to by the congressional committees for denying exclusion of future interest gifts was the apprehended difficulty of determining the number of eventual donees and the value of their respective gifts.

The several exclusions claimed by your Petitioners refer only to gifts to the specifically named grandchildren beneficiaries, all of whom were in being at the date of the particular gift. There is no question of identity of donee, and no occasion for undertaking to apportion any gift between two or more beneficiaries.

Petitioners recognize that Article 11 of Regulation 79 (1936 Edition) was effective and binding in accordance with its provisions on December 2, 1937, the date of the making of the gifts now under consideration.

Petitioners furthermore admit that if the reasonable construction of the trust instruments is to the effect that the use, possession or enjoyment by the specifically named grandchild beneficiary was to be had only at the discretion of the

trustee, then, under well reasoned authorities, the gifts were gifts of future interests.

In its opinion in the instant case the Tax Court of the United States stated that notwithstanding it was made the express duty of the trustee to see that the specifically named grandchild beneficiary was properly maintained, educated and supported, and if necessary to such end to use both the entire income and corpus of the trust, nevertheless the performance of this duty required the exercise of discretion on the part of the trustee in such sense as to constitute the gifts future interest gifts within the meaning of the revenue act and the applicable regulations; and in support of this conclusion the Court cited the following cases:

> Smith v. Commissioner (C.C.A., 8th Cir.), 131 Fed. (2d) 254;
> Welch v. Paine (C.C.A., 1st Cir.), 130 Fed. (2d) 990;
> Winston Paul, 46 B.T.A. 920;
> Lillian Seeligson Winterbotham, 46 B.T.A. 972;
> Mary M. Hutchings, 1 T.C. 692.

A brief reference to these cited authorities will show that they have no reasonable application to the case in hand.

In SMITH V. COMMISSIONER (supra), the trust instrument expressly provided:

> "Trustee shall be and is empowered and directed, in his sole discretion, to use the principal and income from said estate for the purpose of the education and preparation of said beneficiaries to attain and occupy an advantageous and desirable position in life."
>
> "The Trustee is authorized and directed to expend any or all of the principal sum of said Estate, as in his judgment and discretion may be found necessary, for the personal care and maintenance of said beneficiaries herein, and is authorized to provide, furnish and pay

> for any or all professional or medical services or attendants, during any illness of beneficiaries."

In WELCH v. PAINE (supra) the trusts were created for the trustee's children "now living or hereafter born, in equal shares"; and the trust instruments expressly provided that the trustee could "in his discretion * * * accumulate or withhold and make payments or distributions of shares and income to or for the education or support of any" of the beneficiaries "as the trustee may deem best" with the further provision that in the discretion of the trustee any beneficiary "may be given outright at any time in whole or in part his or her share in the trust figured on the number" of beneficiaries then living.

In WINSTON PAUL (supra) the trust instrument provided that the income was distributable

> "in such proportion as the trustee may in his absolute discretion determine."

In LILLIAN SEELIGSON WINTERBOTHAM (supra) the income was distributable in such proportions as to the trustees

> "shall seem fit and proper * * * (such portion to be determined solely in the judgment and discretion of said Trustees, and without any control over them in the exercise of such judgment or discretion) * * * "

In MARY M. HUTCHINGS (supra) the income could either be accumulated or distributed in the "sole and absolute discretion" of the trustee.

Certainly no one would wish to question the soundness of the decision in either of these cases with the possible exception of the case of SMITH v. COMMISSIONER as to which latter case the criticism of the United States Tax Court in its

opinion in the instant case may be justified. In this case of SMITH v. COMMISSIONER distributions were to be in the "sole discretion" of the trustee, and expenditures of any or all of the corpus were authorized to the extent that in the "judgment and discretion" of the trustee such expenditures might be "found necessary, for the personal care and maintenance of said beneficiaries." But in spite of this unusually strong language, the United States Circuit Court of Appeals for the 8th Circuit held that the discretionary power of the trustee was not such as to permit the trustee to ignore the dominant and controlling purpose of the trust, namely, the well being of the beneficiary, since such a construction would be "tantamount to holding that the trustee might carry out the settlor's directions or ignore them, in accordance with his notion of the proprieties or at his discretion."

In all events these cases, and many others not cited by The Tax Court, firmly establish the rule that the discretionary power of the trustee to control the use, possession and enjoyment by the beneficiary, renders the interest of such beneficiary a future interest within the meaning of the Federal Gift Tax statutes. In all these cases this principle was recognized and applied; in the last four cases to deny exclusions because under the trust instruments involved the discretion of the trustee was held to be controlling, and in SMITH v. COMMISSIONER to uphold the exclusion because, notwithstanding the strong language used, the court was of the opinion that the reasonable interpretation of the entire trust instrument was to make the discretion of the trustee subordinate to the declared purposes of the trust.

How much stronger is the instant case where the purpose of the trust to provide a present interest in the specifically named beneficiary could not have been expressed by more cogent language and where there is a complete absence of discretionary power on the part of the trustee.

There are many other decisions in which the discretionary power of the trustee has been held effective to constitute the gifts in trust gifts of future interest; but in all these cases the powers of the trustee are evidenced by language so clear and definite that there can be no reasonable doubt as to the exercise of discretion by the trustee being made the basis of the beneficiary's rights. We have made a most diligent search of the authorities and the instant case is the only case in the books in which an attempt has been made to find a controlling discretionary power in the trustee where the phraseology of the trust instrument contains neither the word "discretion" nor other comparable term.

In the instant case the majority opinion of the United States Circuit Court of Appeals for the Fifth Circuit contents itself with the statement that the gifts in question are gifts of future interests and that no annual exclusions are allowable and then, without giving any reasons for these conclusions, cites the following cases as supporting the decision.

United States v. Pelzer, 312 U.S. 399;
Ryerson v. United States, 312 U.S. 405;
Fisher v. Commissioner of Internal Revenue, 132 F. (2d) 383;
Commissioner of Internal Revnue v. Wells, 132 F. (2d) 405;
Sensenbrenner v. Commissioner of Internal Revenue, 134 F. (2d) 883;
Commissioner of Internal Revenue v. Phillips' Estate, 126 F. (2d) 851.

Your Petitioners recognize all of these cited cases to be properly decided and to correctly announce the principles of law applicable to their respective facts; but it is most respectfully submitted that neither of these cases nor any rule of decision announced therein can, by any reasonable or proper appli-

cation, support the decision of the Circuit Court of Appeals in the instant case.

In UNITED STATES v. PELZER (supra) the trust was created for ten then living grandchildren of the donor and such other grandchildren as might be thereafter born. No distribution of either income or corpus was permitted to be made until after the expiration of the ten year period next following the making of the gift, and even after the ten year period the distributions were to be made to only those persons who at the time of the particular distribution should comprise the beneficiaries of the trust. The gifts were held to be gifts of future interests.

In RYERSON v. UNITED STATES (supra) the gifts constituted two insurance policies, one to each of two trusts. One trust instrument, executed in 1933, provided that during the life of one of the trustees one-fourth of the net income to the trust should be distributed to such trustee with remainder over for life to her two daughters if surviving at her death, and with further remainders over to their issue per stirpes, but with the further provision that the trust could be terminated by the joint action of the two trustees or by the survivor in the event of the death of one. The other trust instrument, executed in 1934, provided that one-third of the income was to be paid to the widow of trustors' son for life, with remainders over to those persons who would be heirs at law of the son had he died at the same time as the life tenant.

In connection with the 1933 trust instrument the question of the nature of the life interest of the trustee in the one-fourth of the net income to be distributed to her was not properly before the court and therefore is not dealt with in the opinion; but the court specifically decided that the interest of the other daughter, dependent as it was upon the possibility of the prior termination of the trust by the joint action of the two trustees, was a future interest.

In connection with the 1934 trust it was held that the gift was one of future interest because even the gift to the son's widow was contingent upon her surviving the donor at a future date.

In FISHER v. COMMISSIONER OF INTERNAL REVENUE (supra) the trust was for the benefit of donor's six grandchildren and while the income to the trust was to be distributed annually, no distribution of corpus was permitted to be made to any beneficiary until such beneficiary should have attained the age of twenty-five years. The court held that as to income the gift constituted a gift of a present interest but that the postponement of distributions of corpus until the beneficiary should reach the age of twenty-five years made the gift of corpus a gift of future interest.

In COMMISSIONER OF INTERNAL REVENUE v. WELLS (supra) the trust was for the benefit of trustor's two children. The trust indenture named the donor's wife as trustee and provided that the amount of income and principal to be distributed to the beneficiaries should rest entirely in the discretion of the trustee. The court properly held the gifts to be gifts of future interests.

In SENSENBRENNER v. COMMISSIONER OF INTERNAL REVENUE (supra) each of the seven trusts was for the benefit of a particularly named grandchild. The trust instruments provided that during the minority of the particular beneficiary the income to the trust was to be paid either to the donor or to a designated person to be applied by the recipient for the support, maintenance and education of the particular grandchild beneficiary in such manner as the person receiving the payment should in his sole discretion deem best. No distributions of corpus was permitted to be made until the definite future date specifically provided in the trust indenture.

The decision was that the gift of corpus constituted a gift of future interest because its distribution was expressly post-

poned to a fixed future date, but that the gift of income was a gift of present interest notwithstanding that during the minority of the beneficiary no distribution of income was authorized to be made direct to the beneficiary, but such distributions were to be made only to other named parties to be used for the benefit of the minor beneficiary in such way as such distributee in his sole discretion should deem best.

In COMMISSIONER OF INTERNAL REVENUE v. PHILLIPS' ESTATE (supra) the trust was created for the benefit of thirteen beneficiaries, and the trustee was authorized, after paying the expenses incident to the administration of the trust, if he should see fit to do so, to pay to the beneficiaries an allowance in such amount as the trustee might deem desirable or necessary, and with the discretionary power from time to time to increase or decrease said allowance whenever he should deem it to the best interest of the beneficiaries. The trust instrument expressly provided that nothing therein contained should be construed to make it obligatory or mandatory on the trustee to pay any income or allowance to said beneficiaries or any of them prior to either the death of the trustor or the expiration of ten years from the date of the trust indenture, whichever should first occur. The court properly held the gift to be a gift of future interest as to both income and corpus.

Among other enlightening cases dealing with the effect of discretionary power of the trustee are the cases of COMMISSIONER v. TAYLOR, 122 Fed. (2d) 714 (decided August 29, 1941), and DISSTON v. COMMISSIONER OF INTERNAL REVENUE, 144 Fed. (2d) 115 (decided July 12, 1944), and which cases were decided by the United States Circuit Court of Appeals for the Third Circuit.

In the case of COMMISSIONER v. TAYLOR (supra) the trust instrument contained the following provision:

> "the income which may become payable under the terms hereof to any minor child of said John M. Taylor shall be accumulated by Trustees for such child and paid over to such child when he or she shall attain the age of twenty-one years, unless in the opinion of Trustees, in their sole discretion, such income or accumulated income should at any time during the minority of such child be needed for his or her proper education or support, in which event Trustees shall apply any part or all of such income and or accumulated income, as Trustees in their sole discretion may deem expedient, for the education and support of such child during his or her minority."

and the court by majority opinion held that the gifts constituted gifts of future interests. Certainly the phraseology of the trust instrument affords ample support for this decision, but notwithstanding the use of the words "in their sole discretion" CHIEF JUSTICE MARIS felt constrained to write a dissenting opinion wherein he expressed the view that the discretion vested in the trustees was not an arbitrary one, that the authority of the trustees "was conferred upon them solely for the benefit of the minors," and that even under the strong language then being considered the gift "was substantially the same as in the ordinary case of an absolute gift of income to the minor."

In the case of DISSTON V. COMMISSIONER OF INTERNAL REVENUE (supra) two trusts had been created for the benefit of trustor's children and at the time the gifts were made certain of the children beneficiaries were minors.

The trust indentures provided that during the minority of a beneficiary such beneficiary's interest in the income to the trust should be accumulated and paid over to him when he should become twenty-one years of age, but with the express provision that during the minority of any beneficiary the trustee should use for the benefit of the minor such income "as may be necessary for the education, comfort and sup-

port of the respective minors, and shall accumulate for each minor until he or she reaches the age of twenty-one years all income not so needed." This last quoted provision was made expressly superior to the provisions of the trust indenture directing the accumulation of income.

With reference to the distribution of corpus the trust indentures provided that no part of the corpus of the trust should be distributed to a beneficiary until such beneficiary should attain the age of forty-five years; but certain rights of testamentary appointment were vested in the beneficiary prior to his becoming forty-five years of age, and in the absence of such appointment, the trust estate was to pass to his or her descendants and if no descendants to the settlor's other children.

The decision in this case was by divided court. The majority opinion by JONES, C. J., was concurred in by Circuit Judges MARIS, GOODRICH and MCLAUGHLIN. The dissenting opinion was by CIRCUIT JUDGE BIGGS.

The majority opinion discusses at length the provisions of the trust indentures in the light of the decisions in UNITED STATES V. PELZER (supra) and RYERSON V. UNITED STATES (supra), and after reaching the conclusion that these last mentioned cases had no application to the facts then before it, the Court decided that the gifts constituted gifts of present interests and therefore entitled the donor to the annual exclusion provisions of the Revenue Act.

In view of the similarity of the facts in this case of DISSTON V. COMMISSIONER OF INTERNAL REVENUE with the facts in the instant case, and of the fundamental soundness of the principles announced by JUSTICE JONES and his associates, we quote the following excerpts from the majority opinion:

> "the gifts to the minor children were immediate, definite, absolute and irrevocable. In no respect did they depend

upon the happening of an uncertain future event either for the determination of the donees or the quantum of the gifts."

"By direct contrast (the United States v. Pelzer, supra, and Ryerson v. United States, supra) the gifts to the minors in the instant case, which were immediate and absolute, when made, and did not depend upon the donees' survivorship or the happening of any uncertain future event, were gifts of present interests." (Parenthesis inserted by us for explanatory purposes.)

"The provision for the accumulation of income affected neither the identity of the minor donees nor the value of the gifts. At most, the provision was but compliant recognition by the donor of what the law, out of its solicitude for the safeguarding of a minor's property, would have interposed in the absence of the donor's express direction in such regard."

"In the test laid down by Art. 11 of Regulation 79 for determining a future interest, the terms, "use, possession or enjoyment," are used disjunctively. A present possession of an absolute and irrevocable gift is not, therefore, to be submerged by a supposed lack of use or enjoyment which, in turn, rests upon no more than that the income is accumulated for the minor beneficiary during his minority rather than paid directly into his hands."

"We can find nothing in the statute or in its evident purpose (United States v. Pelzer, supra) to warrant imputing to Congress an intent to penalize gifts to minors merely because the legal disability of their years precludes them for a time from receiving their income in hand currently."

"Nor did the authority to the trustees to use, in their sole discretion, the income from the gifts to the minors for their support and education during minority make the income from the gifts any less the minors' property. The discretion was sole only in that it was for the trustees alone to exercise. But, that did not mean that the trustees might exercise the discretion arbitrarily or

capriciously. The discretion was a legal one and, therefore, reviewable by a court of competent jurisdiction for an abuse of its exercise. The discretion thus reposed took nothing away from the absoluteness of the gifts."

"In our opinion an immediate and irrevocable gift to a minor in trust, not dependent for its consummation or continuation upon the happening of uncertain future events, constitutes a transfer of a present interest notwithstanding that the deed of gift provides for the accumulation of the income during the beneficiary's minority and authorizes the use thereof by the trustees, in their sole discretion, for the beneficiary's support and education during minority."

Now let us consider the salient facts of the instant cases in the light of the cases hereinabove referred to.

The first paragraph of Article Three of the trust now under consideration, after specifically providing that "out of the trust estate hereby created * * * the trustee shall provide for the support, maintenance and education of" the particular named grandchild, continues as follows:

"If it is necessary to use any of the corpus of the estate for that purpose and in the judgment of the trustee it is best to do so, said trustee may make advancements out of the corpus of said estate for such purpose for the benefit of our said grandson (granddaughter)."

In construing this language we must keep in mind that when the gifts now under consideration were made the specifically named beneficiaries were respectively from one to seven years of age, and that the paramount and controlling purpose of the several trusts was to provide for the protection, education, support and maintenance of the named grandchildren, and that it was expressly made the duty of the trustee to carry out this purpose. Certainly neither in the light of these definitely announced purposes, nor indeed

from the point of view of common human experience, is it reasonable to find any discretionary power in the trustee as such term is used in the gift tax cases. In these cases discretion means a power to originate the benefit or advantage, to initiate the effectiveness of the beneficence. Freedom of determination and uncontrolled choice is of its essence. The word "judgment" as used in the trust instruments now under consideration has no such connotation. The purpose of the trust and the obligation of the trustee to respect such purpose is clear and unequivocal. The present protection of the grandchild of tender years was assured just as far as it was humanly possible to be accomplished by the use of cogent language. The obligation of the trustee to carry out the purpose of the trust was expressly stated, and the mere fact that there was vested in the trustee the preliminary responsibility to inquire into and evaluate the needs of a small child unable to act on its own account should not reasonably be effective to defeat the declared purpose of the trust.

But respondent contends that the right of the specifically named beneficiary to the use, possession and enjoyment of the trust estate is dependent upon his or her survivorship; and stress is placed upon those provisions of Article Three, in which the trustors expressed the hope that the named beneficiary would "have other adequate and sufficient means of support, and that it will not be necessary to use either the income or the corpus of the trust estate hereby created to properly provide for his (her) education, maintenance and support;" and then provides that if the income should not be needed for the purposes stated it should be passed to capital account as a part of the trust estate.

Keeping in mind that the paramount purpose of the trust was to assure to the specifically named grandchild beneficiaries their protection and well being continuously throughout the period of immaturity from the very instant the trusts were created until the final distribution dates, we appreciate

the fact that this present assurance required that the corpus of the trust be reasonably safeguarded. It was this present assurance of continued well being that formed the controlling purpose of these trusts, and how evanescent and unsubstantial, how utterly invaluable, would have been the right of the beneficiary without some reasonable provision looking to the protection and augmentation of the trust to the extent that such protection and augmentation were consistent with present and continued maintenance and well being of the named beneficiary. It is true that a present gift to an immature child without providing reasonable protection of the corpus of the gift would be of some value, but how much greater this value is if the gift be accompanied by proper safeguards for its protection and effective use. In the one case the child might live like a king while the gift was being consumed. In the other case the well-being of the beneficiary is made doubly sure; first, by making the entire fund available for the child's protection, and second, by providing for the preservation of the trust estate where such preservation is consistent with the controlling purpose of the trust.

The express language of these trust instruments admits of no misunderstanding as to their underlying purpose and intent; and these hopeful expressions were not permitted to stand alone or even to be of equal dignity with the other provisions of the trust instruments, but in the very paragraph by which created were made expressly subordinate to the general purposes of the trust by the concluding sentence which reads as follows:

> "It is expressly provided, however, that our said grandson (granddaughter) shall be properly maintained, educated and supported, and if it be necessary to use all of the income and even all of the corpus of the estate hereby created and all augmentations thereof, it shall be the duty of the trustee to see that this obligation shall be properly and reasonably discharged."

Ultimate dates for final distributions of the corpus were specifically provided, and to the extent that the trust estate should not be earlier distributed, the survivorship of the specifically named grandchild beneficiary until the specified distribution date is a prerequisite to its receiving such distribution. In this sense the survivorship of the beneficiary would be determinative of capacity to share in the particular distribution. But this is merely to say that continuation of life is a preliminary requirement to the future enjoyment of property rights. Certainly one cannot enjoy property after his decease; but this fact constitutes no proper basis for holding that the interest of a fee simple owner of property is a future interest because such owner may die tomorrow. The question is not what use, possession and enjoyment may ultimately be appropriated by the beneficiary, but rather what is the vested and fixed right today; and it is respectfully submitted that immediately the gifts under consideration were made the specifically named beneficiary had a vested and fixed right, uncontrolled by any discretionary power of the trustee to alter, change or ignore; and that this right was a present interest and not a future interest.

In connection with the possible effect of the discretionary powers of the trustee in the instant case a brief reference to one other phase of the trust indentures is proper to be made.

In its opinion in the instant case The Tax Court of the United States suggested that

> "such phrases as 'in the judgment of the trustee,' 'for best interest of said trust estate,' and 'if it be necessary,' which recur frequently in each instrument, adequately vest the trustee with discretionary power and authority."

An examination of the trust instruments shows that these quoted phrases occur only in Article 2 and Article 3.

Article 2 deals with the powers of the trustee in the matter of administering the trust estate, instituting and defending litigation, and more particularly acquiring and disposing of property. Naturally these matters should be handled in such way as "in the judgment of the trustee" would be "for the best interest of the trust estate;" but it goes without saying that The Tax Court did not intend to indicate that these matters were discretionary in the sense that the trustee could do as he pleased, and without any accountability to the beneficiaries for the proper administration of the trust.

In Article Three the words "if it be necessary" occur twice and the words "in the judgment of the trustee" occur once. All of these provisions have been specifically considered earlier in this brief so that further discussion at this point is not felt to be in order.

In concluding this argument brief references to certain phases of the cases of KINNEY V. ANGLIM, 43 Fed. Supp. 431, and SENSENBRENNER V. COMMISSIONER, 134 Fed. (2d) 883, are considered to be in order.

In KINNEY V. ANGLIM (supra), the court was dealing with the case in which the trust was created for the trustor's three granddaughters, with provision for final distributions to the beneficiaries when they should attain the ages of twenty-one and thirty years. The income to the trust was to be paid to the mothers of the several beneficiaries from the inception of the trust until the particular child should reach the age of twenty-one years. The court held that the gifts to each of the three grandchildren were gifts of present interests and the three $5,000 exclusions were held to have been proper.

In SENSENBRENNER V. COMMISSIONER (supra), certain trusts were created for the benefit of seven grandchildren. The trust instruments provided that the income to the trusts during minority of the beneficiary was to be paid either to the donor or to another party designated in the trust instruments, to be used by such distributee for the support, main-

tenance and education of the particular grandchild in such manner as the distributee should in his sole discretion deem best. The corpus of the trusts was to be distributed at a designated future date. The decision was that the gift of income constituted a gift of present interest.

In each of these cases only the income was to be distributed and not the corpus; but even as to income, distribution was not to be made to the minor child but to some other party by whom it might or might not be made available to the child. In the opinion in KINNEY v. ANGLIM no information is given as to the obligation of the mother with reference to income received by her, and it would therefore appear that she might do with this income as she pleased. In SENSENBRENNER v. COMMISSIONER the income was distributable not to the minor beneficiary but either to a designated person or to the donor to be used as such distributee in his sole discretion might deem best.

Surely the rights of the beneficiaries in these two cases were more tenuous and uncertain, and more dependent upon the attitude and discretion of the mother in the one case and the donor or other distributee in the other case, than are the rights of the beneficiaries in the instant case where it is made the express duty of the trustee to see that the named beneficiary be properly maintained, educated and supported.

Conclusion

In the instant case there is no uncertainty as to the identity of the beneficiary and no problem of determining either the number of eventual beneficiaries or the value of respective beneficial interests in the gifts. The gifts are immediate, definite, absolute and irrevocable and in no way dependent upon the happening of any future event either for the determination of the donees or the quantum of the gifts. The specifically named grandchildren beneficiaries are given the

fullest use, possession and enjoyment possible sensibly to confer upon children of such tender years and the trustee can withhold no reasonably necessary or proper support without plainly violating the trust. It is therefore submitted that in view of all the facts and circumstances attendant upon the making of the gifts and of the obligation of the trustee to carry out the underlying purpose of the trust, there is no proper basis in either the law or regulations, or in the reasoning or governmental policy supporting same, for holding that the gifts now under consideration are other than gifts of present interests.

Prayer

Wherefore Petitioners pray that the judgment of the United States Circuit Court of Appeals for the Fifth Circuit affirming the judgment of the Tax Court of the United States be reversed, and that the Supreme Court of the United States render judgment herein decreeing that the several gifts under consideration in this cause are gifts of present interests and not gifts of future interests and that the annual $5,000.00 exclusions are proper to be made by your Petitioners in computing their respective gift taxes for the year 1937, and that the $8,400.00 gift tax deficiency heretofore assessed against each of your Petitioners together with all interest on account thereof be cancelled and annulled, and that your Petitioners be decreed all such other and further relief to which they are justly entitled.

Respectfully submitted,

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